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CHARLES ELMORE

Supreme Court of the United States

October Term, 1932

No. 53

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

SUNBURST OIL & REFINING COMPANY and JOHN H. HAMILTON, Receiver of SUNBURST OIL & REFINING COMPANY,
Respondents.

BRIEF ON BEHALF OF RESPONDENTS

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BRIEF ON BEHALF OF RESPONDENTS

I

Summary

Respondents' brief is based upon three propositions. First, it is maintained that no substantial Federal question is presented. Second, it is urged that upon no theory can petitioner claim that it has been deprived of its property without due process of law or that its obligation of contracts has been impaired. Third, it is pointed out that the judgment of the court below was correctly based upon the rule of *stare decisis*.

The first of these propositions is discussed in section

II of this brief. Section III, which presents an analysis of petitioner's theory, supports the other two propositions.

II.

No Substantial Federal Question Is Raised Herein

Petitioner claims the jurisdiction of the Supreme Court under paragraph (b) of Section 237, of the Judicial Code as amended and re-enacted by the Act of February 13, 1925 (U. S. Code Title 28, Sec. 344).

It is well settled that where the Federal question is devoid of merit and unsubstantial because concluded by previous authorities, the duty to affirm, results.

Deming v. Carlisle Packing Co.,
226 U. S. 102, 57 L. Ed. 140;

Tidal Oil Co. v. Flanagan,
263 U. S. 444, 68 L. Ed. 382;

Fleming v. Fleming,
264 U. S. 29, 68 L. Ed. 547;

Western Union Tel. Co. v. Georgia,
269 U. S. 67, 70 L. Ed. 166;

Live Oak Water Users Ass'n. v. Railroad Commission,
269 U. S. 354, 70 L. Ed. 305;

King Mfg. Co. v. Augusta,
277 U. S. 100, 72 L. Ed. 801.

We must determine first whether a Federal question exists and if so, whether it is such a substantial Federal question as to warrant the Supreme Court's jurisdiction.

The specifications of error set out in petitioner's brief claim that Chapter 257 of the Revised Codes of Mon-

tana, 1921, as enforced by the judgment entered by the court below deprives the petitioner of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and impairs the obligation of the contracts between the petitioner and the respondent, in violation of Article I, section 10, of the Constitution of the United States.

This, then, is the basis of petitioner's attempt to invoke the jurisdiction of the Supreme Court by presenting a Federal question.

Article I, Section 10, of the Constitution of the United States provides:

> "No State * * * shall * * * pass any * * * law impairing the obligation of contracts * * *."

By a long line of decisions this Court has held that this constitutional provision is directed only against impairment by legislation, and not impairment by judgments of the courts. The proposition that judicial impairment is included has been so frequently denied that it cannot support a writ of error to a state Supreme Court.

Tidal Oil Co. v. Flanagan,
263 U. S. 444, 68 L. Ed. 382;

Fleming v. Fleming,
264 U. S. 29, 68 L. Ed. 547;

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.,
125 U. S. 18, 31 L. Ed. 607;

Central Land Co. v. Laidley,
159 U. S. 103, 40 L. Ed. 91;

St. Paul M. & M. R. Co. v. County of Todd,
142 U. S. 282, 35 L. Ed. 1014;

Columbia Ry. G. & E. Co. v. South Carolina,
261 U. S. 236, 67 L. Ed. 629;

Bacon v. Texas,
163 U. S. 207, 41 L. Ed. 132.

The Supreme Court has no jurisdiction to review a judgment of a state court when such jurisdiction is based upon an alleged impairment of contract obligations by reason of the alteration by a state court of a construction theretofore given by it to a particular statute in existence when the contract was entered into.

Bacon v. Texas,
163 U. S. 207, 41 L. Ed. 132;

National Mut. Bldg. etc., Ass'n v. Brahan,
193 U. S. 635, 48 L. Ed. 823;

Kryger v. Wilson,
242 U. S. 171, 61 L. Ed. 229;

Long Sault Dev. Co. v. Call,
242 U. S. 272, 61 L. Ed. 294;

Cross Lake Shooting & Fishing Club v. Louisiana,
224 U. S. 632, 56 L. Ed. 924;

Turner v. Board of Commissioners,
173 U. S. 461, 43 L. Ed. 768;

Fleming v. Fleming,
264 U. S. 29, 68 L. Ed. 547.

In the Fleming case, last cited above, the court said:

"It is urged upon us that the impairment here is legislative, in that the case turned on the effect of No. 3376 of the Iowa Code, that the subsequent judicial construction of it became part of the statute, and gave it a new effect as a law. In other words, the contention is that the same statute was one law when first construed before the making of the contract, and has

become a new and different act of the legislature by the later decision of the court. This is ingenious but unsound. It is the same law. The effect of the subsequent decisions is not to make a new law, but only to hold that the law always meant what the court now says it means. The court has power to construe a legislative act, but it has no power, by change in construction, to date its passage as a law from the time of the later decision. A statute in force when a contract was made cannot be made a subsequent statute through new interpretation by the courts. Any different view would be at variance with the many decisions of this court cited in the Flanagan case.

" 'For these reasons, we must hold that the claim of plaintiffs in error does not raise a substantial Federal question, and dismiss the writ of error for lack of jurisdiction.' "

Here we have no subsequent legislation. Clearly, Article I, section 10, was not violated by any decision of the Supreme Court of the State of Montana. This specification of error on behalf of the petitioner does not raise a substantial Federal question.

It has been held by this court that although a Federal question was referred to in the assignment of error in the state court and in the Supreme Court of the United States, it cannot be considered by the latter court on writ of error to the state court, where it does not appear that the state court dealt with the question.

Cox v. Texas,
202 U. S. 446, 50 L. Ed. 1099.

When the validity of a statute or of an authority exercised under a statute was not considered by the state court on the ground of their being repugnant to the Constitution of the United States, the Federal Supreme Court has no jurisdiction.

Michigan Cent. R. Co. v. Michigan Southern R. Co.,
19 How. 378, 15 L. Ed., 689;

Green v. Frazier,
253 U. S. 233, 64 L. Ed. 878;

Columbia Water Power Co. v. Columbia Electric St. R. etc. Co.,
172 U. S. 475, 43 L. Ed. 521;

Scudder v. Coler,
175 U. S. 32, 44 L Ed. 62.

And where it appears that the state court based its judgment on some grounds independent of any Federal question, the United States Supreme Court will not take jurisdiction if the ground is a good and valid one of itself.

Klinger v. Missouri,
13 Wall. 257, 20 L. Ed. 635.

Nothing in the decisions of either this case (7 Pac. [2d] 927) or the case of Montana Horse Products Co. v. Great Northern Ry. Co., (Mont.) 7 Pac. (2d) 919, upon which the decision of this case below was based, contains any reference to either the due process clause of the Fourteenth Amendment or to Article I, section 10 of the Constitution.

The decision below was based entirely upon the construction to be given a state statute and the effect to be

given a prior state decision construing that statute. This is a matter of state procedure alone, and the highest court of the state is the final judge of the powers conferred by the state law in that regard. No question is presented to sustain a writ of certiorari from the Federal Supreme Court to the state court.

King v. West Virginia,
216 U. S. 92, 54 L. Ed. 396.

A decision of the state court resting upon the construction and not upon the validity of a statute of a state does not present a Federal question. And, the validity of a statute is not drawn in question every time rights claimed under such statute are controverted.

Grand Gulf R. etc. Co. v. Marshall,
12 How. 165, 13 L. Ed. 938;
Ferry v. King County,
141 U. S. 668, 35 L. Ed., 895;
Snell v. Chicago,
152 U. S. 191, 38 L. Ed. 408.

So, the construction placed upon Chapter 257 of the Revised Codes of Montana, 1921, by the Supreme Court of Montana in the case of Doney v. Northern Pacific Ry. Co., 60 Mont. 209, 199 Pac. 432 could not possibly be reviewed here. The State Supreme Court in its decision in this case held that this construction was wrong but that respondent had acquired vested rights under the statute as before construed, which rights could not be taken away simply because of the later opinion repudiating its former decision.

Montana Horse Products Co. v. Great Northern Ry Co.,
(Mont.) 7 Pac. (2d) 919, 925.

This court is bound by the decision of the state court in regard to the meaning of the laws of its own state, and its decisions upon such state of facts raises no Federal question.

Turner v. Board of Commissioners,
173 U. S. 461, 43 L. Ed. 768.

The court below has construed Chapter 257 of the Revised Codes of Montana, 1921, according to the petitioner's contention, and in line with this Court's decision in the case of Arizona v. Atchison, Topeka & Santa Fe Ry. Co., 284 U. S. 370, 76 L. Ed. 185.

Montana Horse Products Co. v. Great Northern Ry Co.,
(Mont.) 7 Pac. (2d) 919 at 926.

Yet, petitioner contends that it is being deprived of its property without due process of law. Petitioner had the benefit of a full hearing in the state courts in the regular course of judicial proceedings. It had the opportunity to present its case and be heard in its support. This is all that is guaranteed by the Fourteenth Amendment to the Constitution of the United States. When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law.

Brinkerhoff-Faris Trust & Savings Co. v. Hill,
281 U. S. 673, 74 L. Ed. 1107;

Central Land Co. v. Laidley,
159 U. S. 103, 40 L. Ed. 91;

Tidal Oil Co. v. Flanagan,
263 U. S. 444, 68 L. Ed. 382;

Walker v. Sauvinet,
92 U. S. 90, 23 L. Ed. 678;

Head v. Amoskeag Mfg Co.,
113 U. S. 9, 28 L. Ed. 889;

Morley v. Lake Shore & M. S. R. Co.,
146 U. S. 162, 36 L. Ed. 925;

Bergemann v. Backer,
157 U. S. 655, 39 L. Ed. 845;

Jones v. Buffalo Creek C. & C. Co.,
245 U. S. 328, 62 L. Ed. 325;

Corrigan v. Buckley,
271 U. S. 323, 70 L. Ed. 969.

The Montana Supreme Court had the power to construe the statutes dealing with the Railroad Commission. It had power to re-examine and overrule the Doney case. As shown before, neither of those matters raises a Federal question; neither is subject to review by this court.

Bacon v. Texas,
163 U. S. 207, 41 L. Ed. 132;

Brinkerhoff-Faris Trust & Sav. Co. v. Hill,
281 U. S. 673, 74 L. Ed. 1107;

Moore-Mansfield Constr. Co. v. Elec. Inst. Co.,
234 U. S. 619, 58 L. Ed. 1503.

Petitioner concedes that the state statutes are valid. It concedes that the Doney case and this case involve only the construction placed upon the statutes by the Supreme Court. It concedes that neither interpretation deprived it of a remedy. Its complaint is that although it enjoyed the remedy, the result was not in its favor.

That being true, this record presents no Federal question as to due process.

Enterprise Irr. Dist. v. Farmer's Mutual Canal Co.,
243 U. S. 157, 61 L. Ed. 644;

Castillo v. McConnico,
168 U. S. 674, 42 L. Ed. 622.

Under no theory does petitioner raise a substantial Federal question. In line with the above authorities this case should be dismissed, and the judgment affirmed.

III

Analysis of Petitioner's Theory

The theory of petitioner's prayer for the reversal of this case is based on one of the two following propositions:

1. That the construction given to Chapter 257 of the Revised Codes of Montana, 1921, by the Supreme Court of Montana, is in effcet the same construction given this statute in the Doney case (199 Pac. 432) and this construction deprives the petitioner of its property without due process of law and impairs the obligation of contracts between the petitioner and the respondent.

2. That if the judgment of the Supreme Court of Montana be construed as one based solely on the doctrine of *stare decisis* it deprives the petitioner of its property without due process of law.

The first position taken by the petitioner clearly is untenable. From a study of the opinions in this case below and in the Montana Horse Products case (7 Pac. [2d] 927) the court's position is evident. The construc-

tion placed upon Chapter 257 of the Revised Codes of Montana, 1921, by the court in the Doney case (199 Pac. 432) was overruled but the court held that the appellant herein had certain vested rights under the statute as construed by the Doney case and that the appellant should not be deprived of these rights by a change in the construction of the statute. This position was specifically pointed out on the petition for rehearing (7 Pac. [2d] pp. 926.)

The basis for petitioner's second position that the judgment is based solely on the doctrine of *stare decisis* then is correct.

No authority can be found to suppport the basis of petitioner's first position that the construction of the statute is to be determined by the judgment in the case and not by statements obtained in the opinion.

However, even if petitioner's first theory should be adopted as correct there would have been no violation of either the due process clause of the Fourteenth Amendment or Article I, section 10 of the United States Constitution.

In other words, suppose that the construction given the statute in question in the Doney case had been reaffirmed instead of overruled. There would have been no basis for an appeal to this court. In effect, the situation is that under the rule announced in the Doney case, a shipper, by an action in court, could recover for excess freight charges paid a carrier, after the Railroad Commission, without authority to award reparations, had determined that a rate was excessive.

The organic and statutory law of Montana allows a carrier only reasonable compensation, and no more, for the services rendered.

Article XV, sections 7 and 9,
Constitution of Montana;

Section 7851, Revised Codes of Montana, 1921.

Under the common law then, as declared by the Constitution, the shipper had the right of reparation but his rights and remedies were superseded by the statute.

Montana Horse Products Co. v. Great Northern Ry. Co. (Mont.) 7 Pac. (2d) 919, 924;

Doney v. Northern Pacific Ry. Co.,
60 Mont. 209, 227, 199 Pac. 432.

Petitioner loses sight of the fact that when the contracts involved herein were made, both the shipper and the carrier knew that if the rates charged were subsequently determined to be excessive the shipper had his statutory remedy to recover the excess from the carrier. The interpretation of the state statute by the Doney case became part of the contract. How then can the carrier claim to have a vested right in the rate charged in view of the existing statute giving the shipper the right to recover for excess freight charges after the Railroad Commission had determined that a rate was excessive. It is impossible to discover herein any violation of Article I, section 10, of the Constitution of the United States. The respondent simply pursued the remedy prescribed by the statute instead of its common law remedy, in enforcing its rights under this statute.

Petitioner's charge that this construction of the statute

deprived it of property without due process of law cannot be sustained. Petitioner enjoyed the process as pursued under this statute. It was given an opportunity to be heard.

Petitioner acknowledged the unreasonableness of the estimated weight upon which respondent was charged. It participated in the proceedings before the Commission at which the old weight basis was formally declared unjust and unreasonable. It participated in the preparation of the agreed statement of facts.

Rate making and rate regulation are reserved to the State by the Montana Constitution (Art. XV, Secs. 5 and 7). Petitioner could charge only a reasonable rate calculated upon a reasonable basis.

Section 7851, Revised Codes of Montana, 1921.

The Commission certainly had the power to declare this estimated weight unreasonable.

Section 3796, Revised Codes of Montana, 1921.

Under the law, as construed by the Doney case, the shipper had an action for reparations in a district court if a rate were unreasonable. This was the "process" prescribed by the state statutes.

Petitioner was deprived of no property by the order of the Commission declaring that the estimated weight was unreasonable. Petitioner agreed that such a finding was correct.

Having been given full opportunity to be heard petitioner cannot complain as to lack of due process.

Washington ex rel. Oregon R. & N. Co.
v. Fairchild,
224 U. S. 509, 56 L. Ed. 863;

Louisville R. Co. v. Siler,
186 Fed. 176;

L. & N. R. Co. v. Schmidt,
177 U. S. 230, 44 L. Ed. 747;

Ill. Cent. Ry. Co. v. Brewing Co.,
(Ky.) 163 S. W. 239;

Turner Creamery Co. v. C. M. & St. P. Ry. Co.,
(S. D.) 154 N. W. 819.

It does not appear that the overruling of the construction put on the statute by the Doney case was based on any constitutional grounds. This Court accepts the construction by the highest court of a state from which a cause comes before it of the statutes of such state.

C. M. & St. P. Ry. Co. v. Risty,
276 U. S. 567, 72 L. Ed. 703.

Rates are subject to legislative control. The paramount requisites of a rate are that it shall not discriminate and that it shall be reasonable. If it does either, directly or indirectly, it is illegal and invalid, and no pronouncement of the Railroad Commission can make it otherwise. Nor can the railroad urge impairment of contract or lack of due process when compelled to disgorge its illegal charges.

The requirements of the due process clause are satisfied if one has reasonable notice and reasonable opportunity to be heard and to present his claim or defense.

Missouri ex rel. Hurwitz v. North,
271 U. S. 40, 70 L. Ed. 818;

Dohany v. Rogers,
281 U. S. 362, 74 L. Ed. 904.

The correct construction to be placed upon the lower court's judgment is that it was one based solely on the doctrine of *stare decisis*. It held that the decision of the

Doney case was manifestly erroneous but that the holding of that case gave just basis for the claim of the shipper and that the shipper's rights should not be impaired by reason of a change in the construction of the statutes by the court.

Petitioner argues that such a judgment deprives the petitioner of its property without due process of law.

Under the construction placed upon this statute by the Doney case the compensation received could only become the lawful vested property of the petitioner if it were a reasonable rate. The rate was held to be unreasonable hence no property right became vested in the carrier.

On the other hand the obligation of a contract in the constitutional sense is the means provided by law by which it can be enforced. The validity and remedy of a contract are both part of its obligation. Respondent possessed vested rights under its contract with the petitioner.

> State of Louisiana v. City of New Orleans,
> 102 U. S. 203, 26 L. Ed. 132, and see note in 26 L. Ed. 132.

A right arising under a statute becomes a vested right standing independent of the statute.

> Pacific M. S. S. Co. v. Joliffe,
> 69 U. S. 450, 17 L. Ed. 805.

Contrary to petitioner's argument, the Supreme Court of Montana did not hold that respondent had a vested right in a mode of procedure. It held that respondent had a vested right to reparations under the contract between the shipper and carrier. Both shipper and carrier were controlled by the law as declared in the Doney case until reversed or modified by the court. The con-

struction given to a statute, although erroneous, before its reversal or modification becomes a part of it as much as though written into it, and the change made in construction will affect only contracts made thereafter.

Douglass v. County of Pike,
101 U. S. 677, 25 L. Ed. 968;

Anderson v. Santa Anna Township,
116 U. S. 356, 361, 29 L. Ed. 633, 635;

Taylor v. Ypsilanti,
105 U. S. 60, 26 L. Ed. 1008;

Township of New Buffalo v. Cambria Iron Co.,
105 U. S. 73, 26 L. Ed. 1024;

Louisiana v. Pilsbury,
105 U. S. 278, 26 L. Ed. 1090;

Fairfield v. Gallatin County,
100 U. S. 47, 25 L. Ed. 544;

Olcott v. County Board of Supervisiors,
83 U. S. 678, 21 L. Ed. 382;

County of Green v. Conness,
109 U. S. 104, 27 L. Ed. 872.

It would be manifestly unjust and improper to deprive the shipper of its legal right to recover the excessive amount of tariff exacted by the railway company as pronounced by the Montana court simply because of the later opinion expressed repudiating the former decision.

Montana Nat'l Bank v. Yellowstone County,
276 U. S. 499, 72 L. Ed. 673.

Who may sue under a state statute, and when, and under what circumstances are questions for the exclusive determination of state tribunals.

DeSaussure v. Gaillard,
127 U. S. 216, 32 L. Ed. 125.

Petitioner urges that the precedent established in the Doney case was merely dictum which could not be the basis of any rights. This is not so. In the Montana Horse Products case (7 Pac. [2d] 919) it was expressly stated that it was not obiter dictum:

"In application of the doctrine of stare decisis a decision of this court is authority upon the points actually involved, presented and argued by counsel, and passed upon. Accordingly, the language employed in the Doney Case above noted is not merely to be considered as obiter dictum. After our statutes had received such erroneous construction by this court, the shipments were made and the rates approved by the board of railroad commissioners paid under protest. It must be concluded that the holding in that case gave just basis for the claim of the shipper although the decision in that case now appears to us to be manifestly erroneous, and the shipper's demand should not now be lightly considered or impaired by reason of a change in construction of the statutes by this court. All that is necessary to make a decision of this court authoritative is that there shall appear to have been an application of the judicial mind to the precise question adjudged and that the point was fully considered (Spratt v. Helena Power Transmission Co., 37 Mont. 60, 94 P. 631), all of which appears to have been done in the Doney Case, and such decision must be considered as controlling until reversed by this court."

The court was expressing its interpretation of the state statute. The meaning attributed by a state court to a

state statute is accepted by the United States Supreme Court.

Knights of Pythias v. Meyer,
265 U. S. 30, 68 L. Ed. 885.

The rule of *stare decisis* was correctly applied by the Montana Supreme Court. The application of this rule did not violate the due process clause of the United States Constitution.

IV.

Conclusion

From the foregoing it seems clear that the following propositions have been established:

1. That the case presented by the Petitioner is not one within the provisions of paragraph (b) of section 344, Title 28, U. S. C. A. since no substantial Federal question is raised herein.

2. That the judgment of the court below is to be construed as one based solely on the doctrine of *stare decisis*.

3. That the state statute as construed by the court below did not impair the obligation of contracts between petitioner and respondent so as to be violative of Article I, section 10, of the Constitution of the United States.

4. That the state statute as construed by the court below did not deprive the petitioner of its property without due process of law within the meaning of the Fourteenth Amendment to the United States Constitution.

5. That the rule of *stare decisis* was correctly applied by the court below.

Therefore, it is respectively urged that this court dis-

miss Petitioner's appeal, and affirm the judgment of the Supreme Court of the State of Montana.

Respectfully submitted,

GEORGE E. HURD,
Attorney for Respondents.